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No. 99-1172

In the Supreme Court of the United States

FEDERATION OF ADVERTISING INDUSTRY REPRESENTATIVES, INC., an Illinois not-for-profit corporation,

Petitioners,

v.

CITY OF CHICAGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a Chicago ordinance limiting the placement of publicly visible signs advertising cigarettes to locations relatively less accessible to minors as a means of reducing the illegal use of cigarettes by minors is preempted by section 5(b) of the Federal Cigarette Labeling and Advertising Act, which provides that state and local governments may impose no "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of . . . cigarettes . . . ."

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STATEMENT

On September 10, 1997, the Chicago City Council enacted an ordinance regulating the location of publicly visible signs advertising cigarettes and alcoholic beverages. R. 37, ¶ 1; R. 48, Ex. F; *see also* Chicago City Council, Journal of the Proceedings of the City Council of the City of Chicago, Sept. 10, 1997, at 52332-35. The ordinance prohibits publicly visible signs advertising cigarettes and alcoholic beverages with the following locational exceptions—at special events; on Chicago Transit Authority vehicles; on property used by the Illinois Sports Facilities Authority; at Comiskey Park, Soldier Field, the United Center, and Wrigley Field; on property adjacent to interstate highways; in districts zoned as commercial-manufacturing, manufacturing, or motor freight terminals; and generic signs on the premises of the holder of a license to sell cigarettes or alcoholic beverages. R. 38, Ex. A; R. 48, Ex. F.[1]

The Preamble to the ordinance finds:

> WHEREAS, Illinois law and the Municipal Code of Chicago make it unlawful for any individual under 18 years of age to purchase or be sold cigarettes, and make it unlawful for any individ-

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[1] As originally enacted, the ordinance applied only to contracts executed after the effective date of the ordinance and to renewal terms of preexisting contracts beginning after the effective date of the ordinance. R. 38, Ex. A. On February 6, 1998, the ordinance was amended to apply to all signs, but allowed signs that had been in place before January 31, 1998 to remain in place until 180 days from the effective date of the ordinance. R. 38, Ex. B; R. 48, Ex. F.

ual under 21 years of age to purchase or be sold alcoholic liquor; and

WHEREAS, more than three million minors under the age of 18 consume more than 947 million packs of cigarettes annually in the United States, yielding gross sales to the tobacco industry each year of approximately $1 billion; and

WHEREAS, cigarettes are the most heavily advertised product in America, and the tobacco industry spends more than $421 million annually for outdoor advertising of cigarettes, and alcoholic beverages are the second most heavily advertised products in America, and the alcoholic beverage industry spends more than $100 million annually for outdoor advertising of its products; and

WHEREAS, outdoor advertisements are a unique and distinguishable medium of advertising which subjects the general public to involuntary and unavoidable forms of solicitation, as contrasted with, for example, newspapers, magazines, or radio; and

WHEREAS, the Supreme Court and other courts have recognized the positive relationship between advertising and consumption as regards a variety of goods and services; and

WHEREAS, in addition to judicial recognition of the general link between advertising and consumption, there is evidence that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes by minors, including articles in the *New England Journal*

of Medicine, American Journal of Public Health, Journal of Pediatrics, and other scientific journals, and research has also shown that children's attitudes favorable to alcohol are significantly related to their exposure to alcohol advertisements; and

WHEREAS, studies have shown that our nation's adolescents commonly use cigarettes, and that cigarettes constitute a "gateway" drug for these youth, i.e., a substance which is used by adolescents as a first drug and opens the door for use of other "harder" substances at a later date, and studies have also shown a strong correlation between alcohol use and juvenile crime, that a striking association exists between alcohol use and juvenile suicide by firearm, and that alcohol use by minors correlates with drowning accidents, diving accidents, and school truancy and damage to school property; and

WHEREAS, an ordinance restricting the placement of advertisements for cigarettes and alcoholic beverages in publicly visible locations within the City of Chicago is a reasonable and necessary measure for reducing illegal transactions and illegal consumption of cigarettes and alcoholic beverages by minors, and for the promotion of the welfare and temperance of minors exposed to such advertisements, and

WHEREAS, the restrictions contained in the following ordinance will not unduly burden legitimate business activities of persons licensed by the City of Chicago to sell cigarettes and alcoholic beverages on a retail basis; and

> WHEREAS, in order to protect legitimate business activities and to narrowly focus its efforts on those advertisements that most directly affect minors where they live, attend school, attend religious services and engage in recreational activities, the City Council has determined not to restrict advertisements of cigarettes or alcoholic beverages in certain areas hereinafter identified . . . .

R. 48, Ex. F.

Articles from the journals cited in the preamble were made part of the record before the City Council. *See* R. 10. Although the articles contain references to the health hazards of cigarettes, they focus on other matters as well, including the addictive character of cigarettes and their costs. *See* R. 47, ¶ 4. One article in the *New England Journal of Medicine* entitled "The Human Costs of Tobacco Use," was published in parts; the first part concerned health issues, *see* R. 10-2A at 56; the second discussed the costs and economic consequences of cigarettes, including a discussion of tobacco advertising and marketing, *id.* at 530-33. A second article in the *New England Journal of Medicine* is entitled "Current Trends in Cigarette Advertising and Marketing." R. 10-2A at 542. This article refers to the public health problem created by cigarettes, *see* R. 37, ¶ 4(c); R. 10-2A at 542-43, and discusses at length the extent and effect of cigarette advertising, R. 10-2A at 542-52, including a discussion of the effects of the advertisements on minors, *id.* at 550.

An article in the legislative record from the *American Journal of Public Health*, entitled "The Illegal Sale of Cigarettes to U.S. Minors, Estimates by States," con-

tains data concerning the extent of underage cigarette use in Illinois. R. 10-2A at 527-29. The article notes that "cigarette smoking kills more than 400,000 Americans each year," R. 37, ¶ 4(b); R. 10-2A at 527, but it primarily explains the methods and materials used to compile data on the sale of cigarettes to minors, which are set forth in a chart of estimated sales to minors in each state. R. 10-2A at 527-28. The chart estimates that 12.86 million packs of cigarettes were sold to minors in Illinois in 1991. *Id.* at 528.

The article before the City Council from the *Journal of Pediatrics* is entitled "Relationship Between High School Student Smoking and Recognition of Cigarette Advertisements." R. 10-2A at 523. The article published the results of a study described by the authors as having "[t]he purpose . . . to examine and verify the relationships between cigarette brand preference, advertising recall, and smoking level in a population of U.S. high school students." *Id.*

The City Council also heard from or considered written material submitted by both proponents and opponents of the ordinance. *See* R. 10-1 at 7-8; 15-364. A number of studies and reports were introduced into the record before the City Council. *See* R. 10-1, Aff. of Alderman Bernard Stone at ¶ 8; R. 10-2A, 10-2B. These included an abstract of the studies and reports entitled "Cigarette and Alcohol Facts," which listed, along with information on alcohol, statistics concerning the consumption of cigarettes by minors, information on outdoor advertising of cigarettes, information on the role of advertising in encouraging minors' use of cigarettes, and the correlation of cigarette use with other behavior. R. 10-2A at 228-33.

On October 30, 1997, petitioner filed a complaint seeking declaratory, injunctive, and other relief on the ground that the new ordinance was invalid under both the First Amendment, as well as preempted by section 5(b) of the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1334(b). R. 1-1. On July 29, 1998, the district court granted petitioner's motion for summary judgment on preemption, and enjoined the ordinance's enforcement. Pet. App. 14a-33a. The district court concluded that the ordinance's stated objective—to discourage smoking by minors—was itself a preempted "requirement or prohibition . . . based on smoking and health" within the meaning of section 5(b), because of its view that the Illinois statute that prohibits the sale of cigarettes to minors is itself premised on an interest in protecting the health of minors. On this point, the district court relied on an 1898 decision of the Illinois Supreme Court upholding an earlier version of the state statute prohibiting the sale of cigarettes to minors on the ground that it was a reasonable exercise of police power to protect the public health. See Pet. App. 26a-30a (citing *Gundling v. City of Chicago*, 176 Ill. 340, 52 N.E. 44 (1898), aff'd, 177 U.S. 183 (1900)).

The court of appeals reversed. To construe the preemptive effect of section 5(b), the court reasoned, it was required to "examine the congressional scheme and legislative history of § 5(b) in order to determine what Congress meant by this broad language." Pet. App. 7a. When doing so, the court added, it should presume that Congress does not intend to preempt state and local authority "in areas traditionally occupied by the historic police powers of the state." Pet. App. 8a. Moreover, the court added, the intent of Congress is properly discerned "from the language of the Act, the statutory

framework and the structure and purpose of the Act as a whole." *Ibid.* The court of appeals then identified two critical aspects of congressional intent reflected in the FCLAA's text, structure, and legislative history: first, that state and local governments not be permitted to mandate "diverse, nonuniform, and confusing cigarette labeling and advertising regulations," Pet. App. 9a (quoting 15 U.S.C. § 1331(2)(B)), and second, that Congress did not intend to preempt state or local authority to exercise "traditional police powers," including the power to protect minors, Pet. App. 10a. Given this underlying structure and purpose, the Chicago ordinance was not preempted, since it involved an exercise of the historic police power over zoning, and did not interfere with the congressional policy of requiring uniformity in cigarette labeling. See Pet. App. 10a-12a.[2]

ARGUMENT

A host of factors counsels against plenary review in this case. First and foremost, while petitioner claims that the decision below is inconsistent with a decision of the Ninth Circuit, that asserted conflict has yet to mature. The Ninth Circuit is currently considering rehearing in its case, which has in any event largely been resolved through an apparent settlement between the parties. Thus, it is unclear whether a majority of the Ninth Circuit will adhere to the panel opinion on which

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[2] The court of appeals found only the ordinance's exemption of generic advertising to be preempted since that exemption effectively treated advertising differently based upon its content. See Pet App. 12a. The court nevertheless found this one aspect of the ordinance to be severable from the valid remaining provisions in the ordinance. See Pet. App. 12a-13a.

petitioner relies, and it is equally unclear whether the case currently pending in that circuit, in light of its unusual posture, is an appropriate basis on which to conclude that a conflict in the circuits exists.

And regardless of the supposed conflict, this case is a poor vehicle for plenary review. Its importance has been vastly diminished by a settlement between the major tobacco producers and 46 states that provides for sweeping restrictions on cigarette advertising. This case is also in an interlocutory posture, with what petitioner considers to be significant First Amendment challenges to both the cigarette and the liquor advertising restrictions in the ordinance left to be adjudicated in the district court. Moreover, the decision below was eminently correct; it is fully supported by this Court's consistently cautious approach to preemption in areas that touch upon traditional state and local police powers.

1. The primary basis on which petitioner seeks plenary review is an asserted conflict in the circuits. As petitioner acknowledges, the decision below is consistent with the law in two other circuits. See *Greater New York Metropolitan Food Council, Inc. v. Giuliani*, 195 F.3d 100 (2d Cir. 1999), petition for cert. filed, 68 U.S.L.W. 3480 (Jan. 12, 2000) (No. 99-1171); *Penn Advertising, Inc. v. Mayor and City Council*, 63 F.3d 1318 (4th Cir. 1995), vacated and remanded, 518 U.S. 1030 (1996), reaffirmed as modified, 101 F.3d 332 (4th Cir. 1996), cert. denied, 520 U.S. 1204 (1997). Nevertheless, petitioner asserts a conflict between the decision below and the Ninth Circuit's subsequent decision in *Lindsey v. Tacoma-Pierce County Health Department*, 195 F.3d 1065 (9th Cir. 1999). This claim is premature. As petitioner acknowledges, the Ninth Circuit, on its own mo-

tion, issued an order directing briefing on whether the case should be reheard en banc. See Pet. 8-9 n.5.

The status of *Lindsey* is further complicated because the parties to that case, subsequent to the Ninth Circuit's panel decision but prior to the issuance of the order directing briefing on whether the case should be reheard, had entered into an agreement that the county health department and the other defendants in the case "would not seek further review and the plaintiffs would not seek attorneys fees under 42 U.S.C. § 1983." Defendant-Appellees' Brief On Whether The Court Should Grant En Banc Review 4 n.15, *Lindsey v. Tacoma-Pierce County Health Department* (filed Jan. 18, 2000) (emphasis deleted). A review of the defendants' brief filed in response to the court's rehearing order discloses that the defendants construe their agreement to permit them to urge the court to rehear the case in response to the court's order, but it is unclear how the full Ninth Circuit will react to the partial settlement. The Ninth Circuit may well decide to hear another case presenting this issue en banc even if it decides not to rehear *Lindsey*; surely the court's sua sponte order in *Lindsey* indicates that there is considerable disquiet on the full court with the panel opinion. Given the unusual posture of the *Lindsey* case, then, it is quite unclear not only whether a majority of the Ninth Circuit is prepared to adhere to the panel's decision, but also whether the *Lindsey* case itself is an appropriate candidate for en banc review. Thus, petitioner's assertion that a conflict in the circuits has reached the point where this Court's review is warranted is premature, at best.

2. The practical significance of the question presented by this case has been greatly reduced if not elimi-

nated by a comprehensive settlement between the major tobacco producers and some 46 States, a settlement which, among other things, has produced sweeping restrictions on tobacco advertising. See, *e.g.*, Alex Kuczynski, *Big Tobacco's Newest Billboards Are on the Pages of Its Magazines*, N.Y. Times, Dec. 12, 1999, at A1. Under the settlement, tobacco manufacturers have agreed to eliminate outdoor advertisements of tobacco products in the settling states.[3] Although the settlement does not bind the billboard companies that petitioner represents, it does bind all major tobacco producers. And under the settlement, tobacco manufacturers have agreed to cease outdoor cigarette advertisements, meaning that they will no longer be leasing space for cigarette advertising billboards from petitioner's members. For its part, while petitioner acknowledges the settlement (Pet. 4 n.1), petitioner does not attempt to explain why, in the wake of the settlement, the issue presented by the petition remains of sufficient importance to justify plenary review.

In fact, it is far from clear that this case continues to present a live controversy. While the record on this point is at present undeveloped, we entertain grave doubts as to whether any of the entities that petitioner represents has any concrete financial stake in the outcome of this case at this juncture. At present, all major tobacco advertisers have agreed to the Master Settlement Agreement. Moreover, pursuant to the Master Settlement Agreement, Illinois has enacted legislation imposing substantial financial penalties on tobacco

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[3] The pertinent provisions of the Master Settlement Agreement can be found in the Appendix to this brief.

manufacturers selling cigarettes in Illinois that do not agree to comply with the Master Settlement Agreement. See 30 ILCS 168/15 (West Supp. 1999). Thus, it seems quite unlikely that any of the billboard companies that petitioner represents still has any realistic likelihood of entering agreements to display cigarette advertising even if the judgment below is overturned. Thus, if this Court granted plenary review, it could well ultimately conclude that the most prudent course of action is to remand the case for a hearing on mootness, rather than reaching the merits of the question presented by the petition. At a minimum, it is clear that the practical import of the decision below is not great. For this reason as well, plenary review would be inappropriate.

3. Yet another factor counsels against plenary review in this case: the decision below is interlocutory. Petitioner challenged the Chicago ordinance at issue not only on preemption grounds, but also under the First Amendment. In reversing, the court of appeals remanded this case to the district court with instructions that it address petitioner's First Amendment claims. See Pet. App. 11a n.4, 13a. Thus, the ultimate outcome of this case remains in doubt. For that reason, review of this case at this time might result in piecemeal demands on this Court's time. Moreover, this litigation will continue regardless how this Court resolves the preemption issue that the petition raises because of petitioner's unadjudicated challenge to the locational restrictions on alcohol billboards. And in light of the tobacco settlement, petitioner's remaining stake in this case largely, if not entirely, involves the alcohol prohibition, making it especially appropriate to let the litigation on the alcohol prohibition run its course.

4. In any event, the decision below was correct. It is supported by the settled rule presuming that Congress does not intend to preempt the traditional police powers of state and local governments. Here, nothing in the text or history of section 5(b) of the FCLAA supplies a basis to overcome this presumption.

When this Court last addressed section 5(b) of the FCLAA, in *Cipollone v. Liggett Group*, 505 U.S. 504 (1992), it cautioned that any inquiry into the preemptive effect of section 5(b) "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Id.* at 516 (brackets and ellipses in original) (quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). What is more, a majority of the Court cautioned that section 5(b) should be narrowly construed. See *id.* at 523 (plurality opinion); *id.* at 532-33 (Blackmun, J., concurring in part and dissenting in part). In fact, the Court's approach in *Cipollone* was surgical. For a majority of the Court, preemption turned on whether a particular duty was imposed under state law on those engaged in the marketing and promotion of cigarettes because of a desire to protect public health, or for some other reason, and therefore only state-law duties imposed solely to protect public health should be preempted by section 5(b). See *id.* at 528-29 (plurality opinion) (finding fraudulent misrepresentation claims not preempted because they "are not predicated on a duty 'based on smoking and health' but rather a more general obligation—the duty not to deceive"); *id.* at 554 (Scalia, J., concurring in the judgment in part and dissenting in part) ("I would ask . . . whether whatever the source of the duty,

it imposes an obligation in this case because of the effect of smoking upon health").

The presumption against preemption of historic state and local police powers is fully applicable here. Even petitioner does not quarrel with the court of appeals' conclusion that this ordinance involves an exercise of traditional zoning powers to which the presumption against preemption applies. See Pet. App. 10a-11a. And there is nothing in the text or the legislative history of the FCLAA to suggest that Congress intended to invade this exercise of police powers.

Petitioner argues that the court of appeals improperly drew a distinction between regulation of the location of advertising, which is not preempted, and regulation of its content, which is. See Pet. 14-16. There is nothing in the decision below, however, that endorses a rigid distinction between content and location. Rather, the court of appeals correctly recognized that the Chicago ordinance involves an exercise of local zoning powers and for that reason is based on a governmental interest that should be protected from preemption absent some plain statement of congressional intent. See Pet. App. 8a-9a. To the contrary, as the court of appeals observed, both the statute's own statement of purpose and its legislative history reflects no desire to interfere with the ability of state and local governments to protect minors. See Pet. App. 9a-10a. Indeed, as the court of appeals also observed, petitioner's reading of section 5(b)—finding preemption of any state or local law restricting the promotion of cigarettes if related to the protection of minors' health—would lead to absurd results that Congress could not have intended. See Pet. App. 8a-9a ("We cannot imagine that Congress intended

the states to be without power to prohibit a cigarette company from handing out free cigarettes in an elementary schoolyard.").

Even more important, as the Chicago ordinance's preamble makes plain, the purpose of the ordinance was to protect minors. State and local governments, of course, have ample reasons to be concerned about discouraging the use of cigarettes by minors even apart from the relationship between "smoking and health." Indeed, the preamble to the Chicago ordinance asserts no relationship between smoking and health, but rather asserts that the sale of cigarettes to minors is illegal under applicable state law. Discouraging lawbreaking is surely a legitimate governmental purpose. And even aside from that, the materials before the City Council demonstrated that cigarettes are addictive, see, *e.g.*, R. 10-2A at 535, 539, and hence the City Council could reasonably wish to discourage minors from undertaking an addictive and possibly lifelong habit when they are not yet mature enough to evaluate the consequences of lifelong addictions. Smoking, for example, is a habit that many find unattractive, unpleasant, or inconsiderate, and it is undeniably costly. In short, even if medical science could somehow neutralize the adverse health consequences of cigarettes, most parents would still not want their children to take up smoking for a variety of reasons, just as they do not want them to gamble, drink alcohol, or develop any other addiction. Thus, when a state or local government asserts its desire to protect minors from potentially addictive substances, it asserts a governmental interest far broader than the concern for protecting the public health. Accordingly, it is exceedingly unlikely that Congress, as it preempted state and local regulation "based on smoking and health,"

intended to reach measures designed to discourage illegal sales of cigarettes to minors, or measures designed to protect minors from taking up addictive and costly habits.

For all these reasons, then, the clarity that should be required before federal legislation is held to invade the traditional state and local power to protect minors is not present here. The court of appeals was faithful to the twin rules embraced by a majority of the Court in *Cipollone*—section 5(b) should be narrowly construed, and it should be presumed not to invade traditional state and local police powers. The decision below stands in no tension with *Cipollone* nor the FCLAA, and for that reason should be left undisturbed.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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